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September 28, 2018

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ATTORNEY GENERAL'S OFFICE

Via Facsimile Only (304/424-1804)

Hon. Carole Jones, Clerk  
Circuit Court of Wood County  
Wood County Judicial Building  
Room 131  
2 Government Square  
Parkersburg, WV 26101-5353

Re: State of West Virginia, ex rel. Mac Warner v. Shale Energy Alliance, Inc.  
Civil Action No. 18-C-162

Dear Ms. Jones:

Enclosed for filing in the above-referenced civil action please find "**Defendant Shale Energy Alliance, Inc.'s First Amended Answer to Plaintiff's Complaint in Civil Action**", a copy of which has this day been served upon counsel of record.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

HENDRICKSON & LONG, PLLC

*J. Andrew Skeens*

J. Andrew Skeens

JAS:lkx

Enclosure

cc: Anthony Martin, Esquire (w/enc.)

**IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA**

**STATE OF WEST VIRGINIA ex rel.  
MAC WARNER**

**Plaintiff,**

**v.**

**Civil Action No: 18-C-162**

**SHALE ENERGY ALLIANCE, INC.,  
a Delaware Corporation**

**Defendant.**

**DEFENDANT SHALE ENERGY ALLIANCE, INC.'S FIRST AMENDED ANSWER  
TO PLAINTIFF'S COMPLAINT IN CIVIL ACTION AND AFFIRMATIVE DEFENSES**

COMES NOW Defendant Shale Energy Alliance, Inc. ("SEA"), by and through undersigned counsel submits the following answers and affirmative defenses to Complaint filed in the above-captioned action:

**PARTIES**

1. For its response to Paragraph 1, SEA admits that Mac Warner is the current Secretary of State of West Virginia, and that the Secretary of State's Office is the filing office for all nonprofit corporations transacting business in the state as well as the office overseeing election matters.

2. For its response to Paragraph 2, SEA admits that it is a Delaware-chartered nonprofit corporation registered as a 501(c)(4) "social welfare organization" with the Internal Revenue Service bearing the alleged FEIN. SEA further admits that it has an office located at 201 East Main Street, Suite 900, Lexington, Kentucky 40507 and a mailing address of P.O. Box 436, Sewickley, Pennsylvania 15143. SEA further admits that it registered with the West

Virginia Secretary of State's Office as a foreign nonprofit corporation on November 5, 2015.

SEA, upon information and belief, denies all other allegations contained in this paragraph.

#### JURISDICTION AND VENUE

3. For its response to Paragraph 3, SEA admits, upon information and belief, that venue and jurisdiction are appropriate in Wood County, West Virginia.

#### CONDUCT ALLEGATIONS

4. For its response to Paragraph 4, SEA, upon information and belief, denies the allegations.

5. For its response to Paragraph 5, SEA, upon information and belief, admits that it has entered into contracts to be performed in the state of West Virginia. SEA denies all other allegations contained in Paragraph 5.

6. For its response to Paragraph 6, SEA, upon information and belief, denies the allegations.

7. The allegations in Paragraph 7 pertain to conduct of the Secretary of State of West Virginia. To the extent a response is required, SEA, upon information and belief, denies all allegations contained in this Paragraph.

8. For its response to Paragraph 8, SEA, upon information and belief, denies the allegations.

9. For its response to Paragraph 9, SEA admits that it made filings of Independent Expenditure reports with the Secretary of State to disclose several expenditures that SEA made. SEA, upon information and belief, denies all other allegations contained in Paragraph 9.

10. The allegations contained in Paragraph 10 pertain to conduct of the Secretary of State of West Virginia and contain conclusions Plaintiff has drawn. To the extent a response is required, SEA, upon information and belief, denies all allegations contained in this Paragraph.

11. SEA admits that David K. Hendrickson contacted the Secretary of State of West Virginia as counsel for SEA and that a meeting between David K. Hendrickson and representatives of the Secretary of State's Office took place. SEA, upon information and belief, denies all other allegation contained in this Paragraph.

12. For its response to Paragraph 12, SEA, upon information and belief, denies the allegations.

13. For its response to Paragraph 13, SEA, upon information and belief, denies the allegations.

#### COUNT ONE

##### VIOLATION OF THE ELECTION CODE

14. Paragraph 14 does not require a response.

15. Paragraph 15 does not require a response.

16. Paragraph 16 contains conclusions of fact and law made by Plaintiff. SEA disagrees with these conclusions and to the extent a response is required, denies all allegations contained in this Paragraph.

#### COUNT TWO

##### VIOLATION OF THE NONPROFIT ACT

17. Paragraph 17 does not require a response.

18. Paragraph 18 does not require a response.

19. Paragraph 19 contains conclusions of fact and law made by Plaintiff. SEA disagrees with these conclusions and to the extent a response is required, denies all allegations contained in this Paragraph.

#### **PRAYER FOR RELIEF**

20. Paragraph 20 contains Plaintiff's requests to this Court for relief for the allegations levied in Plaintiff's complaint. SEA disagrees that Plaintiff is entitled to such relief and to the extent a response is required, denies all allegations contained in this Paragraph.

#### **AFFIRMATIVE DEFENSES**

In order to preserve important legal rights and protections, SEA sets forth below certain Affirmative Defenses which, based on the information set forth in the Amended Complaint, it believes applies or may apply at some point to Plaintiff's claims. SEA reserves the right to withdraw, amend or modify some or all of the affirmative defenses. By designating the section "Affirmative Defenses," SEA is not assuming any additional burdens not already imposed by law.

##### **First Affirmative Defense**

Plaintiff's interpretation of the West Virginia Election Code is unconstitutional, insofar as Plaintiff alleges that SEA is required to register as a Political Action Committee with the West Virginia Secretary of State's Office.

##### **Second Affirmative Defense**

The Amended Complaint fails to state a claim upon which relief may be granted against SEA.

### **Third Affirmative Defense**

To the extent discovery reveals the same, SEA reserves the defenses set-forth in Rule 8(c) of the Rules of Civil Procedure including:

- a. accord and satisfaction;
- b. estoppel;
- c. laches;
- d. payment;
- e. release;
- f. statute of limitations;
- g. waiver, and
- h. any other matter constituting an avoidance or affirmative defense.

### **Fourth Affirmative Defense**

To the extent discovery and facts warrant, SEA reserves the defenses of improper venue, insufficiency of process, lack of jurisdiction and any other applicable defenses under the Rules of Civil Procedure.

### **Fifth Affirmative Defense**

Plaintiff's claims are barred, in whole or in part, by the doctrine of assumption of risk.

### **Sixth Affirmative Defense**

Plaintiff's claims are to be reduced or diminished to the extent that Plaintiff failed to mitigate his damages.

### **Seventh Affirmative Defense**

Plaintiff's alleged damages have been caused in whole, or in part, by the acts, omissions, conduct and/or negligence of parties other than SEA. If Plaintiff sustained injuries as alleged in

Plaintiff's Complaint, the injuries were caused, in whole or in part, by the acts and/or omissions of one or more third persons for whose conduct SEA is not responsible and/or with whom SEA had no legal relationship, control, responsibility or liability.

**Eighth Affirmative Defense**

If Plaintiff sustained injuries as alleged in Plaintiff's Complaint, the injuries were caused, in whole or in part, by Plaintiff's own conduct including, but not limited to, comparative negligence, contributory negligence, and assumption of risk. In the event that SEA is found liable to Plaintiff, wholly or in part, SEA is entitled to have its liability reduced by the proportionate share of liability which represents the degree of culpability attributable to Plaintiff.

**Ninth Affirmative Defense**

The sole proximate cause of Plaintiff's injuries and damages, if any, was the negligence of Plaintiff.

**Tenth Affirmative Defense**

Plaintiff's claims are barred, in whole or in part, by its failure to join all proper and necessary parties.

**Eleventh Affirmative Defense**

To the extent discovery and facts warrant, SEA all affirmative defenses set forth in Rule 12(b) of the West Virginia Rules of Civil Procedure.

**Twelfth Affirmative Defense**

SEA did not commit any act or omission which was a proximate cause of the claimed injuries or damages of Plaintiff.

**Thirteenth Affirmative Defense**

SEA denies that it breached any duty owed to Plaintiff.

#### **Fourteenth Affirmative Defense**

If there is any actionable liability of SEA, which liability is specifically denied, such liability should be compared to the fault of Plaintiff, the other defendants, and any other actor involved in the matters alleged in Plaintiff's Complaint. SEA alleges that any award made to Plaintiff in this action must be proportionately allocated among Plaintiff, Defendant, and other actors found to be culpable in accordance with the percentage of any negligence or fault attributable to each of said Plaintiff, Defendant, parties and actors. SEA further alleges that any Defendant, or other actor found to be negligent or at fault with respect to Plaintiff's alleged claims must be required to satisfy any such claims only in accordance with its proportional share of negligence or fault to be determined in this action.

#### **Fifteenth Affirmative Defense**

To the extent alleged in Plaintiff's Complaint, SEA denies that it engaged in any intentional, malicious, willful, wanton, reckless, or fraudulent conduct or that it engaged in any conduct with the intent to injure Plaintiff.

#### **Sixteenth Affirmative Defense**

The amount of punitive damages (if any are sought) is a question of law and not a fact question for a jury; accordingly, Plaintiff's request for a jury trial on that issue is to be stricken or, in the alternative, the jury verdict is not entitled to any weight or deference whatsoever pursuant to *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

#### **Seventeenth Affirmative Defense**

Plaintiff is not entitled to punitive damages from SEA because Plaintiff failed to allege sufficient facts to demonstrate any act or omission on the part of SEA met the requirements of W.Va. Code § 55-7-29 (2015).

### **Eighteenth Affirmative Defense**

Plaintiff's claim for punitive damages, if any should arise, as applied in this case violates the Fifth, Eighth and Fourteenth Amendments of the United States Constitution to the extent it exceeds the standards and limitations set forth in *State Farm Mut. Auto. Inc. Co. v. Campbell*, 123 S.Ct. 1513 (2003).

### **Nineteenth Affirmative Defense**

Plaintiff's claim for punitive damages, if any should arise, violates the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, jointly and separately, of the Constitution of the United States and in analogous provision of the West Virginia Constitution in that:

- a. It seeks an award of punitive damages that is vastly disproportionate to any actual harm and thus exceeds the standards of substantive and procedural due process under the Eighth and Fourteenth Amendments of the U.S. Constitution;
- b. It seeks a disproportionate award of punitive damages that constitutes an arbitrary and capricious taking of property which is unjustified by any legitimate governmental interest, thereby violating the Fifth and Fourteenth Amendments of the U.S. Constitution;
- c. It seeks an award of punitive damages without sufficient substantive and procedural standards to guide the jury's discretion in determining both the liability and amount of punitive damages to be awarded thus violating the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution;
- d. It seeks punitive damages under substantive standards of liability that are vague, ambiguous, subjective and not reasonably ascertainable thus it is "void for vagueness" under the Fourteenth Amendments of the U.S. Constitution.
- e. It seeks punitive damages for conduct by SEA which complied with all applicable statutory, regulatory and/or administrative rules and regulations thus failing to furnish fair notice of punishable conduct and violating the Due Process and Equal Protection Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution;
- f. It seeks punitive damages based, in whole or part, upon improper character evidence consisting of other alleged misconduct that is dissimilar and/or immaterial to the conduct that harmed the Plaintiff thus violating the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution;

- g. It seeks punitive damages based, in whole or part, upon improper character evidence consisting of other alleged misconduct that is dissimilar and/or immaterial to the conduct that harmed the Plaintiff thus violating the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution;
- h. It seeks punitive damages based, in whole or part, upon the financial status of SEA thus violating the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution and the Equal Protection Clause of the Fourteenth Amendment;
- i. It seeks punitive damages based, in whole or part, upon hypothetical evidence of other similar claims thus violating the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution;
- j. The applicable state law does not provide fair notice of the conduct that will subject SEA to punishment; nor a reasonable limitation on the degree of punishment; nor fair notice of the severity of punishment for the alleged misconduct thus violating the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution;
- k. Plaintiff's claim improperly seeks to justify an award of punitive damages based on a profit-removal theory that is based on the removal of each dollar of profit made by SEA from other alleged similar acts of misconduct thus violating the Due Process and Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.
- l. The applicable state law fails to provide a clear, objective and consistent appellate standard for post-verdict review of punitive damages thus violating the Fifth and Fourteenth Amendments of the United States Constitution; and,
- m. An allowance of punitive damages in this case would violate the commerce clause of the United States Constitution.

### **Twentieth Affirmative Defense**

Any claim for punitive damages is barred because under the common law and public policies of the State of West Virginia an award of punitive damages by a jury would be improper where the jury: a) is not provided constitutionally adequate standards of sufficient clarity for determining the appropriate imposition of, and the appropriate size of, a punitive damage award; b) is not adequately instructed on the limits of punitive damages imposed by the applicable

principals of deterrence and punishment; c) is not expressly prohibited from awarding punitive damages, or determining the amount of an award of punitive damages, in whole or part on the basis of invidiously discriminatory characteristics, including without limitation the residence, wealth and status of SEA; d) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes punitive damages permissible; e) is not properly instructed regarding Plaintiff's burden of proof with respect to each and every element of a claim for punitive damages and is inconsistent with West Virginia law.

#### **Twenty-First Affirmative Defense**

Any claim for punitive damages is barred because the laws of the State of West Virginia and the laws of the United States regarding the standards for determining liability for and the amount of punitive damages failed to give SEA prior notice of the conduct for which punitive damages may be imposed and the severity of the penalty which may be imposed and are void for vagueness in violation of SEA's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

#### **Twenty-Second Affirmative Defense**

SEA reserves the right to amend its Answer and defenses if investigation, discovery and further information should warrant such amendment, and, further, to assert applicable matters of law during the pendency of this action.

#### **Twenty-Third Affirmative Defense**

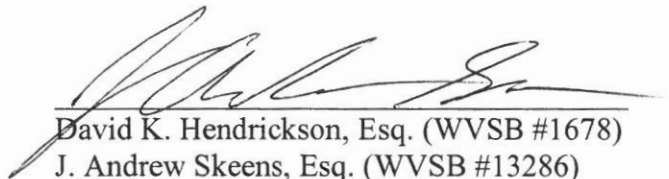
SEA reserves unto itself:

A. Each and every affirmative defense raised by any other defendant, to the extent applicable, and incorporates those defenses by reference as though they were set-forth verbatim herein; and

B. The right to file any cross-claim, third-party claim and/or other additional pleading as discovery demonstrates their necessity.

WHEREFORE, SEA ask this Court to dismiss, with prejudice, Plaintiff's Complaint and that SEA recover costs incurred in connection therewith, including reasonable attorneys' fees.

**DEFENDANT REQUESTS A TRIAL BY JURY**



David K. Hendrickson, Esq. (WVSB #1678)

J. Andrew Skeens, Esq. (WVSB #13286)

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214 Capitol Street

Charleston, West Virginia 25301

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*Counsel for Defendant*

**IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA**

**STATE OF WEST VIRGINIA ex rel.  
MAC WARNER**

**Plaintiff,**

**v.**

**Civil Action No: 18-C-162**

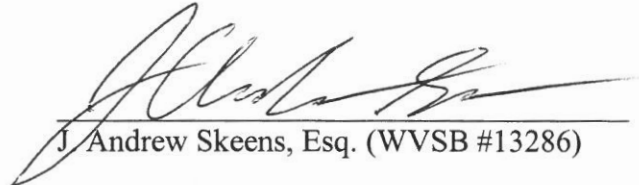
**SHALE ENERGY ALLIANCE, INC.,  
a Delaware Corporation**

**Defendant.**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 28<sup>th</sup> day of September, 2018, I caused true and accurate copies of the foregoing "DEFENDANT SHALE ENERGY ALLIANCE, INC.'S FIRST AMENDED ANSWER TO PLAINTIFF'S COMPLAINT IN CIVIL ACTION AND AFFIRMATIVE DEFENSES" to be served upon all counsel of record by U.S. Mail, and email, postage prepaid to:

Anthony Martin  
Chief Deputy Attorney General  
Office of the West Virginia Attorney General  
Bldg. 1, Rm. E-26  
State Capitol Building  
Charleston, WV 25305

  
J. Andrew Skeens, Esq. (WVSB #13286)